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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Walton v. Arizona, 497 U.S. 639 (1990), held that Arizona's capital sentencing statute, which assigns solely to the trial judge the responsibility for making the findings of fact which are necessary to subject a defendant to a death sentence, does not contravene the Sixth Amendment's jury-trial right as made applicable to the States through the Fourteenth Amendment's Due Process Clause.

The question presented is whether *Walton* should be overruled in light of this Court's subsequent holding, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that "for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed" (*id.* at 490 (internal quotation marks omitted)) violates the defendant's Sixth Amendment right to a jury trial.

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Petitioner, Timothy Stuart Ring, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arizona in this case.

OPINIONS BELOW

The opinion of the Arizona Supreme Court (Pet. App. 1a-44a) is reported at 25 P.3d 1139 (Ariz. 2001). The judgment of the Superior Court of Maricopa County (Pet. App. 45a-53a), is unreported.

STATEMENT OF JURISDICTION

The judgment of the Arizona Supreme Court was entered on June 20, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of Arizona law are set forth in the appendix to this petition at Pet. App. 54a-61a.

STATEMENT OF THE CASE

This case presents the question of whether the Sixth Amendment right to a jury determination of facts that increase the available range of punishment for criminal defendants subject to a term of *imprisonment* applies as well to defendants subject to the penalty of *death*. The Supreme Court of Arizona held that it does not, explaining that it was constrained to so hold by this Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990).

A. Arizona's Criminal Code defines the crime of first degree murder to include participation in the commission of a robbery "in the course of and in furtherance of" which a person is killed. Arizona Revised Statutes ("A.R.S.") § 13-1105(A)(2). The statutory maximum sentence that may be imposed, based upon the jury's finding of the facts

constituting the crime of first degree murder, is life imprisonment. A.R.S. §§ 13-1105(C), 13-703; Pet. App. at 7a, 8a, 25a-26a.

Arizona's statutes further provide, however, that after the jury returns a verdict of guilt of the crime of first degree murder, the judge must conduct a "separate sentencing hearing" – in the absence of the jury – on the basis of which he or she may find facts increasing the maximum available punishment to a sentence of death. A.R.S. § 13-703(B) ("The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state."); Pet. App. at 7a, 8a, 25a-26a. Specifically, the judge may find that certain facts treated as "aggravating circumstances" are present. A.R.S. § 13-703(E), (F).[1] The judge "shall" impose a sentence of death upon finding one or more of these facts, unless the judge also finds mitigating circumstances "sufficiently substantial

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1. Aggravating facts include (i) that the defendant committed a previous offense (A.R.S. § 13-703(F)(1), (F)(2)), (ii) that the defendant knowingly created a grave risk of death to persons other than the decedent (A.R.S. § 13-703(F)(3)), (iii) that the defendant procured the commission of the offense by payment (A.R.S. § 13-703(F)(4)), (iv) that the defendant committed the offense in expectation of the receipt of anything of pecuniary value (A.R.S. § 13-703(F)(5)), (v) that the defendant committed the offense in an especially heinous, cruel or depraved manner (A.R.S. § 13-703(F)(6)), (vi) that the defendant committed the offense while incarcerated or on parole (A.R.S. § 13-703(F)(7)), (vii) that the defendant has been convicted of other homicides committed during the commission of the offense in question (A.R.S. § 13-703(F)(8)), (viii) that the defendant was an adult at the time of the offense and the victim was under fifteen or over seventy (A.R.S. § 13-703(F)(9)), and (ix) that the victim was an on duty peace officer (A.R.S. § 13-703(F)(10)).

to call for leniency." A.R.S. § 13-703(E).[2] At the conclusion of the "separate sentencing hearing," the judge returns a "special verdict" setting forth factual findings with regard to any aggravating or mitigating facts. A.R.S. § 13-703(D). These findings determine whether the defendant will be sentenced to death. A.R.S. § 13-703(A), (B), (E).

B. Petitioner Timothy Stuart Ring was charged with participating, along with two others, in the robbery of an armored van. Pet. App. at 2a-7a. A jury found Ring guilty of first degree felony murder, based on circumstantial evidence pertaining to his participation in the robbery and the fact that the van's driver had been shot and killed. Pet. App. at 7a. The maximum statutory penalty for which Ring was eligible, on the basis of the jury's finding that he was guilty of this crime, was life imprisonment. A.R.S. § 13-703; Pet. App. at 7a, 8a, 25a-26a.

The judge who presided over Ring's trial then conducted the required nonjury "separate sentencing hearing" to determine whether facts justifying the imposition of the death penalty were present. A.R.S. § 13-703(B); Pet. App. at 7a. An accomplice to the charged crime testified at the hearing, pursuant to a plea bargain arranged after the jury's verdict was received. Pet. App. at 7a-8a. The accomplice – who did not testify at Ring's trial – asserted at the sentencing hearing that Ring led

2. Mitigating circumstances include (i) a significant impairment of the defendant's capacity to appreciate the wrongfulness of his conduct (A.R.S. § 13-703(G)(1)), (ii) unusual and substantial duress (A.R.S. § 13-703(G)(2)), (iii) the defendant's relatively minor role in the offense (A.R.S. § 13-703(G)(3)), (iv) the unforeseeability to the defendant of the death (A.R.S. § 13-703(G)(4)), (v) the defendant's age (A.R.S. § 13-703(G)(5)), and any other factors proffered by the defendant or the State "which are relevant in determining whether to impose a sentence less than death" (A.R.S. § 13-703(G)).

the planning of the robbery, shot the armored van's driver, and subsequently asked to be "congratulated" on his shot. Pet. App. at 8a.

After the sentencing hearing, the judge returned his "special verdict." Pet. App. at 45a-53a. The judge found that Ring led the planning of the robbery, Pet. App. at 47a, and that the killing of the armored van's driver was done in the expectation of receiving something of pecuniary value, A.R.S. § 13-703(F)(5); Pet. App. at 48a-49a. Relying on the accomplice's testimony at the sentencing hearing, *see* Pet. App. at 26a, 28a-30a, 47a, 49a-50a, the judge also found that Ring shot and killed the armored van's driver, and that he subsequently asked to be "congratulated" on his shot – establishing (the judge found) that he had acted in a "heinous" and "depraved" manner. Pet. App. at 49a-50a. These judge-made findings rendered Ring eligible for a sentence of death, which the judge then proceeded to impose. Pet. App. at 53a.[3]

C. Ring appealed to the Supreme Court of Arizona, arguing (*inter alia*) that Arizona's capital sentencing scheme violates the Sixth and Fourteenth Amendment principles articulated in *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Ring

3. The judge acknowledged that Ring's "minimal criminal record" was a mitigating circumstance weighing against the imposition of the death penalty, but found this factor insufficiently substantial to call for leniency. Pet. App. at 52a-53a. The Arizona Supreme Court rejected the judge's finding of heinousness or depravity, *see* Pet. App. at 29a-33a, but affirmed his finding that the crime was committed for pecuniary gain, *see* Pet. App. at 33a-34a.

argued that these decisions established that a State sentencing scheme that removes from the jury the role of finding facts that increase the prescribed range of penalties to which a criminal defendant is exposed violates the right to a jury trial guaranteed by the Sixth Amendment, as made applicable to the States by the Fourteenth Amendment. Because Arizona's capital sentencing scheme removed from his jury the role of finding the facts necessary to increase the maximum penalty to which he could be exposed from life imprisonment to the penalty of death, Ring argued, the application of the scheme to him violated his Fourteenth Amendment rights. The State countered that *Walton v. Arizona*, 497 U.S. 639 (1990), a pre-*Apprendi* decision holding that Arizona's capital sentencing scheme was constitutional, was "still the controlling authority on point." Pet. App. at 23a.

The Arizona Supreme Court agreed with the State's contention that "neither *Jones* nor *Apprendi* overruled *Walton*," but noted that both cases nevertheless "raise[d] some question about the continued viability of *Walton*." Pet. App. at 23a. In light of what it viewed as "unclear language" in the *Apprendi* and *Jones* decisions, the court proceeded to set forth a "further explication" of the "practical operation of Arizona's death penalty scheme, as applied under the peculiar facts of the present case." Pet. App. at 23a-24a.

The court began by describing the Sixth Amendment standards set forth in *Jones* and *Apprendi*. In *Jones*, the court observed, this Court stated that " 'diminishment of the jury's significance by removing control over facts determining a statutory sentencing range' would violate the Sixth Amendment." Pet. App. at 24a (*quoting Jones*, 526 U.S. at

248). Likewise in *Apprendi*, the court noted, this Court held that " 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " Pet. App. at 24a (*quoting Apprendi*, 530 U.S. at 490).

The court then noted that the *Apprendi* majority's rationale for concluding that these Sixth Amendment principles would not invalidate "a capital sentencing scheme like Arizona's" was that Arizona's scheme "merely 'requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death,' " and does not " 'permit[] a judge to determine the existence of a factor which makes a crime a capital offense.' " Pet. App. at 24a (*quoting Apprendi*, 530 U.S. at 496-97). The court observed that Justice O'Connor, in her dissent in *Apprendi*, found the majority's distinction of *Walton* " 'baffling, to say the least,' " insofar as its premise – that in Arizona " 'the jury makes all of the findings necessary to expose the defendant to a death sentence' " – was " 'demonstrably untrue.' " Pet. App. at 25a (*quoting Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting)).

The court then confirmed that Arizona's capital sentencing scheme, as exemplified in Ring's case, was "precisely as described in Justice O'Connor's dissent—[Ring's] death sentence required the judge's factual findings." Pet. App. at 26a. The court explained that under Arizona law, "[t]he range of punishment allowed by law on the basis of the verdict alone" is life imprisonment, and that "[i]t is only after a subsequent adversarial sentencing hearing,

at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death." Pet. App. at 25a (citing A.R.S. § 13-703(B)); *see also* Pet. App. at 26a ("when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present").

Having offered this "explication" (Pet. App. at 24a) of Arizona's capital sentencing scheme, the court again acknowledged that this Court has thus far refrained from overruling *Walton*. Pet. App. at 26a. The court observed that it was therefore bound to "conclude that *Walton* is still the controlling authority," and accordingly was required to reject Ring's constitutional challenge to Arizona's scheme. Pet. App. at 27a.[4]

REASONS FOR GRANTING THE WRIT

This Court's recent decisions place the continued viability of *Walton* in grave doubt. A number of State and federal courts have echoed Justice O'Connor's *Apprendi* dissent in noting the irreconcilability of *Walton* and *Apprendi*, but have felt bound to follow *Walton* until this Court revisits it. There can be no serious question that this

4. One Justice declined to join this portion of the court's opinion. Pet. App. at 41a-43a (Martone, J., concurring in the judgment). He stated that the majority was wrong "to question *Walton*" (Pet. App. at 41a) because Arizona's capital sentencing statute authorized the penalty of death on the basis of the jury's verdict "in a formal sense" (Pet. App. at 42a), and thus was consistent with the principles underlying *Apprendi*.

issue, which goes to the constitutionality of the capital sentencing schemes currently in place in nine States, is one of substantial public importance. Nor can it be suggested that any purpose would be served by deferring consideration of the question squarely presented here for a future Term, since the question of whether *Walton* must be overruled cannot "percolate" in, or become the subject of conflicts among, State and federal courts that are duty-bound to apply *Walton* until this Court overrules it. *Walton* must and should be reexamined promptly, and the present case is an appropriate vehicle for this reexamination to be undertaken.

1. Every member of this Court has either authored or joined opinions that state or suggest that *Walton*'s holding is undermined by this Court's more recent decisions,[5] suggest that *Walton* should be reconsidered in light of the principles articulated in these decisions,[6] or note that *Walton* was based on the rationale that Arizona's capital sentencing statute does

5. *Apprendi*, 530 U.S. at 538 (O'Connor, J., joined by Rehnquist, C.J., Kennedy, and Breyer, JJ., dissenting) ("If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today"); *Jones*, 526 U.S. at 272 (Kennedy, J., joined by Rehnquist, C.J., O'Connor, and Breyer, JJ., dissenting) (stating that the constitutional rule identified in *Jones* and subsequently adopted in *Apprendi* cast doubt on the continued viability of *Walton*, and noting that *Walton* was "a better candidate" than *Jones* itself for the application of that rule).

6. *See Apprendi*, 530 U.S. at 523 (Thomas, J., concurring) (stating that *Walton*'s continued viability in light of the constitutional mandate recognized by Justice Thomas in joining the *Apprendi* majority was "a question for another day"); *Jones*, 526 U.S. at 253 (Stevens, J., concurring) (stating that *Walton* should be reconsidered "in due course" in light of the constitutional principles identified in *Jones* and subsequently adopted in *Apprendi*).

not authorize the judge to make findings of fact that increase the maximum sentence to which a defendant is exposed[7] – a rationale that the Arizona Supreme Court has now authoritatively rejected. *See* Pet. App. at 25a ("[t]he range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for 'natural life' without the possibility of release"); *id.* at 26a ("the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present"); *id.* at 26a ("[Ring's] death sentence required the judge's factual findings").

Furthermore, a number of State and federal courts, including the Arizona Supreme Court in this case, have noted the irreconcilability of *Walton* and *Apprendi*. Pet. App. at 23a ("While the state is correct in noting that neither *Jones* nor *Apprendi* overruled *Walton*, we must acknowledge that both cases raise some question about the continued viability of *Walton*"); *United States v. Promise*, 255 F.3d 150, 159-60 (4th Cir. 2001) (en banc) (characterizing the continued authority of *Walton* in light of *Apprendi* as "perplexing, if not 'baffling' " and a "conundrum") (*quoting Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting)); *Hoffman v. Arave*, 236 F.3d 523, 542 (9th Cir. 2001), *petition for cert. filed*, 69 U.S.L.W. 3763 (U.S. May 23, 2001) (No. 00-1775) (noting

7. *Jones*, 526 U.S. at 251 (opinion for the Court authored by Souter, J., and joined by Stevens, Scalia, Thomas, and Ginsburg, JJ.) (to distinguish *Walton*, majority undertakes a "careful reading of *Walton*'s rationale," finding that the *Walton* majority "characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available").

that *Apprendi* "may raise some doubt about *Walton*"); *People v. Kaczmarek*, 741 N.E.2d 1131, 1142 (Ill. App. 2000) ("while it appears *Apprendi* extends greater constitutional protections to noncapital, rather than capital defendants, the Court has endorsed this precise principle, and we are in no position to secondguess that decision here"). Indeed, one federal circuit judge found this irreconcilability so intolerable that he refused to consider *Walton* authoritative, reasoning that the *Apprendi* Court failed to articulate a "majority position about the continued viability of *Walton*." *Hoffman*, 236 F.3d at 547 (Pregerson, J., concurring separately).

It is plain that the continued viability of *Walton* is in grave doubt, and that this doubt will persist and intensify until this Court reexamines that decision. Such doubts about the viability of one of this Court's precedents might be tolerable if it pertained to a relatively unimportant question, or one as to which a prompt resolution was not necessary, but the question presented here emphatically does not fall in these categories.

2. The question at issue here implicates constitutional protections that this Court has characterized as "of surpassing importance." *Apprendi*, 530 U.S. at 476. Indeed, it involves the precise issue that this Court identified as "of importance generally in the administration of the death penalty" when it determined to grant certiorari in *Walton* itself. *Walton*, 497 U.S. at 647. Moreover, the question of *Walton*'s continued viability directly governs the constitutionality of the capital sentencing schemes in effect not only in Arizona, but also in

Montana,[8] Idaho,[9] Nebraska,[10] Colorado,[11] Florida,[12] Alabama,[13] Indiana,[14] and Delaware.[15]

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8. Mont. Code Ann. §§ 46-18-301 – 46-18-306 (West 2001) (death sentence may be imposed if judge finds one or more aggravating circumstances after sentencing hearing held before judge alone).

9. Idaho Code § 19-2515 (West 2001) (same).

10. Neb. Rev. Stat. Ann. §§ 29-2520 – 29-2524 (West 2001) (death sentence may be imposed if either trial judge, or panel of three judges, finds sufficient aggravating circumstances after sentencing proceeding held before judge or panel alone).

11. Colo. Rev. Stat. Ann. § 16-11-103 (West 2001) (sentence of death may be imposed if panel of three judges finds at least one aggravating factor after sentencing hearing held before panel alone).

12. Fla. Stat. Ann. § 921.141 (West 2000) (sentence of death may be imposed if judge finds, after receiving advisory jury recommendation, sufficient aggravating circumstances); *see Mills v. Moore*, 786 So. 2d 532, 537 (Fla.), *cert. denied*, 121 S. Ct. 1752 (2001) ("Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either").

13. Ala. Code Ann. § 13A-5-43, 13A-5-45, 13A-5-46 (West 2001) (same).

14. Ind. Code Ann. § 35-50-2-9 (West 2001) (same); *cf. Indiana v. Barker*, No. 49G05-9308-CF-09544 (Marion, Ind. Superior Court Sep. 10, 2001) (holding, without citation to *Walton*, that Indiana's capital sentencing scheme violates the constitutional principles announced in *Apprendi*).

15. Del. Code Ann. tit. 11, § 4209 (West 2000) (same); *see Capano v. State*, __ A.2d __, __, 2001 WL 980939, at *72 (Del. Aug. 10, 2001) (noting that by distinguishing *Walton*, the *Apprendi* majority left intact the line of precedent holding constitutional "death penalty statutes like that in Delaware").

3. A reexamination of *Walton* should be undertaken promptly. Putting off the resolution of this important question for a future Term would unnecessarily extenuate the burdens of doubt and lack of guidance that the tenuousness of *Walton*'s continued viability imposes upon legislatures, courts, and capital defendants.

As long as *Walton* remains unexamined by this Court, every death sentence imposed, and every death sentence carried out, pursuant to the capital sentencing schemes of Arizona, the eight other States enumerated above, and any other States that may determine to implement similar schemes, will be under a heavy cloud of constitutional doubt. And during this period of uncertainty all of the State and federal legislatures will be deprived of crucial guidance in determining whether and how to modify their capital sentencing statutes. *Cf.* Margery M. Koosed, *Averting Mistaken Executions By Adopting The Model Penal Code's Exclusion Of Death In The Presence Of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41, 101 (2001) (noting that a "period of uncertainty" will endure until the Court revisits *Walton*). State and federal courts will be burdened as well, in that they will continue to face the daunting tasks of trying to reconcile fundamentally irreconcilable decisions, and of trying to discern principled and coherent boundaries between the spheres in which each of these precedents should govern. *Cf. Promise*, 255 F.3d at 160 ("It is for the Supreme Court . . . to resolve this conundrum"); *Hoffman*, 236 F.3d at 542-47 (panel split with regard to continued viability of *Walton*).

Until *Walton* is reexamined, moreover, an irrational disjunction between the constitutional legitimacy of judge-made factual findings affecting the length of a defendant's *imprisonment*, as compared to the legitimacy of such findings

affecting the decision to impose a sentence of *death*, will be allowed to persist. *See Apprendi*, 530 U.S. at 537 (O'Connor, J., dissenting) ("If a State can remove from the jury a factual determination that makes the difference between life and death, as *Walton* holds that it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed"); *Jones*, 526 U.S. at 272 (Kennedy, J., dissenting) ("If it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death"); Brief of the United States in *Apprendi v. New Jersey*, No. 99-478, 2000 WL 194804, at *24 (Feb. 14, 2000) ("It would be a strange constitutional regime that permitted [judges to make findings essential before a defendant may be sentenced to death], yet precluded a legislature from specifying a statutory enhancement factor that raised the sentencing range available to a judge in imposing a term of imprisonment"). Arbitrary or unreasonable legal distinctions are no more tolerable when found in this Court's decisional law than they are when present in statutes enacted by legislatures. Indeed, they may be less so, insofar as citizens are powerless to use democratic processes to remove them.

None of the factors that sometimes counsel hesitation in the granting of certiorari are present here to counterbalance these weighty concerns. This is not a case in which the Court can wait for the issue to "percolate" or for a conflict to develop. *United States v. Mendoza*, 464 U.S. 154, 160 (1984); Sup. Ct. R. 10(a). This Court has directed the State and federal courts to refrain from treating one of its precedents as implicitly overruled by its subsequent decisions, however

thoroughly the precedent may have been undermined by the Court's more recent decisions. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Courts have obeyed this directive, continuing to treat *Walton* as authoritatively establishing the constitutionality of State capital sentencing schemes in which judges are required to find specific aggravating factors before imposing a sentence of death. *See* Pet. App. at 26a-27a; *Hoffman*, 236 F.3d at 542; *Capano v. State*, __ A.2d __, __, 2001 WL 980939, at *72 (Del. Aug. 10, 2001); *Mills v. Moore*, 786 So. 2d 532, 537 (Fla.), *cert. denied*, 121 S. Ct. 1752 (2001); *People v. Ochoa*, 110 Cal. Rptr. 2d 324, 361 (Cal. 2001); *Kaczmarek*, 741 N.E.2d at 1142. Because State and inferior federal courts must continue to "leav[e] to this Court the prerogative of overruling its own decisions" (*Rodriguez de Quijas*, 490 U.S. at 484), no percolation or conflict is possible.

4. The doubts that the members of this Court and other courts have articulated with regard to *Walton*'s continued viability provide a sufficient basis for granting certiorari. But it is worthwhile to note as well that these doubts are well-justified.

Apprendi held that with the exception of the fact of prior conviction, every *finding of fact* that raises the maximum punishment to which a defendant may be subjected must be made by a jury. *See Apprendi*, 530 U.S. at 490 (with the exception of the fact of prior conviction, "we endorse the statement of the rule set forth in the concurring opinions in [*Jones*]: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of *facts that increase the prescribed range of penalties to which a criminal defendant is exposed*' ") (*quoting Jones*, 526 U.S. at 252-53 (opinion of Stevens, J.)) (emphasis added); accord *id.* at 482-83

(noting the "novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone").[16] *See also United States v. Rebmann*, 226 F.3d 521, 524 (6th Cir. 2000) ("Our duty, in light of this clear dictate from the Court [in *Apprendi*], is

16. *See also id.* at 482 n.9 (rejecting dissenters' reliance on precedent that did not suggest that a judge may impose "a more severe sentence than the maximum authorized by the *facts found by the jury*" (emphasis added), and quoting a passage from a book stating that the judge may not exceed "*the statutory maximum*" as recognizing "precisely this same limitation"); *id.* at 483 n.10 ("The judge's role in sentencing is constrained at its outer limits by the *facts* alleged in the indictment and *found by the jury*") (emphases added); *id.* at 476 (describing the portion of New Jersey's hate crime law that provided for an increased maximum sentence on the basis of the defendant's *motive* for selecting his victims as identifying a separate "act[]" being singled out for punishment, regardless of the State's labeling it as a " 'sentence enhancement' "); *id.* at 480 (noting that the traditional common law practice required that, when the *circumstances* under which a criminal act was committed authorized a higher punishment, those circumstances were required to be included in the indictment as elements of the offense charged); *id.* at 487 n.13 (limiting the holding of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), to cases that do not involve the imposition of a sentence more severe than the "statutory maximum for *the offense established by the jury's verdict*") (emphasis added); *id.* at 489 n.15 (noting that at common law the indictment was required to contain "an allegation of *every fact which is legally essential to the punishment to be inflicted*") (emphasis added, internal quotation marks omitted); *id.* at 490 n.16 (distinguishing mitigating facts on the ground that they do not give rise to deprivations of liberty or stigma exceeding the deprivations "authorized by the jury verdict according to statute" and those that "accompany[] the jury verdict alone").

to examine whether the sentencing factor in this case was a factual determination, and whether that determination increased the maximum penalty for the crime charged in the indictment"); *United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000) ("*Apprendi* makes clear that the 'prescribed statutory maximum' refers simply to the punishment to which the defendant is exposed solely under the facts found by the jury"); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933 (8th Cir.), *cert. denied*, 531 U.S. 1026 (2000) ("A fact, other than prior conviction, that increases the maximum punishment for an offense is the 'functional equivalent of an element of a greater offense than the one covered by the jury's verdict' ") (*quoting Apprendi*, 530 U.S. at 494 n.19).[17]

The Arizona Supreme Court has now authoritatively established that Arizona's capital sentencing scheme contravenes this Sixth Amendment mandate. The court made plain that, like the statute struck down in *Apprendi*, Arizona's capital sentencing scheme provides that the maximum

17. *But see Capano*, __ A.2d at __ & n.509, 2001 WL 980939, at *72 & *82 n.509 (construing *Apprendi* as requiring only that the defendant have notice that the crime charged may result in the imposition of a certain maximum penalty, and not that the jury make all findings of fact necessary to imposition of that maximum penalty); *Promise*, 255 F.2d at 181, 168-82 (Luttig, J., concurring in the judgment) (acknowledging that the "tenor," "overarching principles," and "much of the . . . critical language" of *Apprendi* "unmistakably" require that all facts that increase a defendant's sentence must be proven to the jury beyond a reasonable doubt, but arguing that the holding of *Apprendi* can be construed more narrowly); Pet. App. at 41a-43a (Martone, J., concurring in the judgment) (arguing that *Apprendi* does not bar a judge from finding the facts necessary to the imposition of a sentence of death as long as the statute defining the crime "authorizes the maximum penalty of death in a formal sense").

penalty to which a criminal defendant is exposed may be increased on the basis of factual findings made unilaterally by a judge. Indeed, in light of the court's opinion, the primary distinction remaining between *Apprendi* and the instant case is that in *Apprendi* the Sixth Amendment issue pertained to a ten-year increment in the defendant's prospective prison sentence, whereas here the Sixth Amendment question is literally one of life or death. If anything, the "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge" that underlies the Sixth Amendment's jury trial right is *more* pronounced, not less so, when the judge's factual findings determine whether the defendant will live or die. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

Although it nevertheless was constrained to apply *Walton* in light of its continued authority, the court made plain that *Walton* rests on a mistaken construction of Arizona law. Indeed, the Arizona Supreme Court's opinion appears to have been designed specifically to give this Court an authoritative statement of Arizona law it that may use in reconsidering *Walton*, and thus implicitly to urge this Court do so. The court observed that *Walton* rested on the assumption that Arizona's statutes did not " 'permit[] a judge to determine the existence of a factor which makes a crime a capital offense' " (Pet. App. at 24a (*quoting Apprendi*, 530 U.S. at 497); *cf. Jones*, 526 U.S. at 251), and authoritatively declared this premise to be incorrect. Pet. App. at 26a ("the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present"). Thus, whatever basis the *Walton* Court's construction of Arizona law may have had when that case was decided, the foundation of that decision is now fully eroded.

For these reasons, and in light of the confusion, uncertainty, and unfairness that the continued authority of *Walton* creates, we ask the Court to take this opportunity to reconsider *Walton* in light of the important constitutional principles announced in *Apprendi v. New Jersey*.[18]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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18. We are aware of two other pending petitions for certiorari presenting this question. *See* Petitions for Certiorari in *Hoskins v. Arizona*, No. 00-9744 (filed Apr. 30, 2001), and *Dickens v. Arizona*, No. 01-5474 (filed July 23, 2001).

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF ARIZONA DATED JUNE 20, 2001

IN THE SUPREME COURT OF THE
STATE OF ARIZONA
En Banc

Supreme Court No. CR-97-0428-AP

Maricopa County No. CR95-01754(A)

STATE OF ARIZONA,

Appellee,

v.

TIMOTHY STUART RING,

Appellant.

OPINION

June 20, 2001

Appeal from the Superior Court in Maricopa County
The Honorable Gregory H. Martin, Judge
AFFIRMED

* * *

Appendix A

FELDMAN, Justice.

¶1 On December 6, 1996, a jury found Defendant, Timothy Stuart Ring, guilty of first-degree murder, conspiracy to commit armed robbery, armed robbery, burglary, and theft. Defendant was sentenced to terms of imprisonment for the robbery, burglary, theft, and conspiracy convictions. Because the trial judge sentenced Defendant to death for the murder, direct appeal to this court is automatic. A.R.S. § 13-703.01. We have jurisdiction pursuant to Arizona Constitution article VI, § 5.3, A.R.S. § 13-4031, and Arizona Rules of Criminal Procedure 31.2.b.

FACTS AND PROCEDURAL HISTORY

¶2 At approximately 2:00 p.m. on November 28, 1994, a Wells Fargo armored van servicing Dillard's department store at Arrowhead Mall was reported missing by Dave Moss, the van's "hopper."[1] At approximately 6:30 p.m. that same day, a Maricopa County Sheriff's deputy discovered the missing van in the parking lot of a Sun City church. All of the van's doors were locked, the engine was running, and a body was slumped over on the passenger side. The body was that of the van's driver, John Magoch, who had been killed by a gunshot wound to the head.

¶3 Wells Fargo determined that its losses from the robbery totaled $833,798.12, of which $562,877.91 was in cash. Although no eyewitnesses to the crime came forward, one

1. "Hopper" is the slang term for a street messenger, which is the armored-car employee who enters businesses to collect/deliver money while the driver stays inside the armored vehicle.

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person riding his bicycle in Sun City on the afternoon of the robbery claimed to have seen a white van, followed by a red pick-up truck, run a stop sign. This witness stated that one man was driving the red truck while two people were in the van. Another witness also saw a white van followed by a red pick-up truck. Although she remembered one man driving the van, she testified that either two or three men were in the red truck.

¶4 Through information provided by an informant, the Glendale Police Department contacted Judy Espinoza, who believed that her boyfriend James Greenham and a friend of Greenham's named "Tim" may have been involved in the robbery. "Tim" later turned out to be Defendant — Timothy Ring. Glendale Police interviewed Espinoza on December 30, 1994. Espinoza stated that when she heard about the robbery on the radio, she remembered that a week before Greenham had asked her what she would do "if he hit an Armored car." State's Exhibit # 33, at 2. Espinoza also remembered that, although Greenham had been staying with her, he was not at home on the night of the robbery and during that week he was "very stressed out." *Id.* at 3. In addition, shortly after the robbery, Greenham handed Espinoza a bag of rolled coins totaling approximately $250 and gave Espinoza's mother $800 in cash to pay bills. Finally, Espinoza informed the police that Greenham's friend Tim owned a red truck. About a week before the interview with police, Greenham had stopped dating Espinoza and had moved out of her home.

¶5 While conducting surveillance of Greenham, the police noticed that he appeared to be riding a new motorcycle.

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Random phone calls to motorcycle dealerships revealed that, in December 1994, Greenham and Defendant made large cash purchases at Metro Motor Sports. Specifically, Defendant bought two ATVs and a motorcycle from the dealership for $7,500 and $7,300, respectively. Over the next several weeks, Defendant and Greenham both made many more expensive purchases, all of them cash transactions. Wiretaps on certain telephones belonging to Defendant and Greenham began on January 9, 1995. On January 21, 1995, Defendant called William Ferguson and discussed Greenham's purchase of a new truck, the trouble this caused with Greenham's ex-wife, and what impact that trouble might have on their plans "up north." State's Exhibit # 49A, at 11. In that call, Defendant threatened to "cut off" Greenham's supply, as Defendant held "both his and mine." *Id.* The two also talked about disappearing for two years after "up north happens," then reuniting in Las Vegas. *Id.* at 14. Four days later, Ferguson bought a new motorcycle for $8,700 cash, paying in fifty and one-hundred dollar bills.

¶6 On January 26, 1995, Greenham called Defendant's pager and entered the following code: 20*2000*04. He followed that call with another code: 50*5000*04. In conversations between Defendant and Ferguson, Defendant had referred to Greenham as "zero four." Later that day, Defendant asked Greenham, "The two pages you sent . . . those are your requests, is that right?" To which Greenham responded, "Yeah." State's Exhibit # 52A.

¶7 As part of the investigation of Defendant, arrangements were made with Waste Management Company to perform a "trash cover," enabling investigators to sort through and

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survey Defendant's waste. During this process, police acquired two notecards, written by Defendant, with addresses of businesses serviced by Loomis Armored Cars, as well as numbers corresponding to Loomis trucks. Defendant was employed by Loomis in 1988-89 and, at trial, claimed that the notecards pertained to his employment at that time.

¶8 The police then attempted to generate discussion between the conspirators about the robbery. On January 31, 1995, the police issued a news release that was aired on local television stations. Defendant called Greenham at approximately 10:30 that evening and left a message on Greenham's answering machine to "remind me to talk to you tomorrow and tell you what was on the news tonight. Very important, and also fairly good." State's Exhibit # 55A. A few days later, Detective Tom Clayton from the Glendale Police Department left his business card on the door of Greenham's residence, requesting that Greenham call and "refer to lead 176." In response, Greenham made an emotional, panicked telephone call to Defendant. Greenham also apparently called his ex-wife, who was so concerned about his well-being that she asked Phoenix Police to visit Greenham's apartment to check on him. Coincidentally, Defendant stopped by Greenham's apartment at the same time. Defendant later discussed this incident with Ferguson, telling him "I don't know what to think of it. Uhm, his house is clean. Mine, on the other hand, contains a very large bag." State's Exhibit # 70A, at 7. Later that same day, Defendant also said, "it doesn't really make a whole lot of sense, because given the information that they do have, both public and what I've been able to ascertain privately . . . if they were gonna come after somebody, it would be me." State's Exhibit

71A, at 10-11. Ferguson ended the call by saying that he would "keep a suitcase packed." *Id.* at 17.

¶9 On February 14, 1995, the police again attempted to generate conversation by airing a "Silent Witness" re-enactment on the local news that contained several deliberately incorrect details about the robbery and murder. Defendant called Ferguson at 10:51 p.m. to talk about the broadcast. Ferguson claimed to have "laughed my ass off" and said he was "not real worried at all now." State's Exhibit # 80A, at 3. Defendant stated that "there's only one thing that slightly concerns me," and asked, "What if push comes to shove down the months and they ask for hair and fibers, so forth, and it happens to somehow . . . ." *Id.* at 4. Later in the conversation, Defendant said, "there was a couple of in continuities (sic) to their story . . . . They showed a suppressed revolver of all things." *Id.* at 25.

¶10 Two days later, on February 16, 1995, a search warrant was served on Defendant's residence. Police found a homemade sound suppressor attached to a Ruger 1022 rifle[2] barrel behind the hot water heater in a corner of Defendant's garage. Also in the garage, inside a storage cabinet, police discovered a green duffel bag with Defendant's name on it. The bag contained bundles of United States currency totaling $271,681. Defendant also had $1,040 in a headboard in the master bedroom. In a notebook found in the same headboard,

2. At trial, however, the state was unable to connect this weapon to the crime. The bullet that killed Magoch was not recovered, and the pathologist who performed the autopsy could not testify conclusively as to the type of weapon or caliber of bullet that caused Magoch's lethal wound.

police discovered a post-it note that had the number "575,995" on it. Below the number was the word "splits," with the three letters "F," "Y," and "T," and numbers below the letters totaling 575,995, which is remarkably similar to the total cash amount taken in the robbery. An expert testified that this note was written by Defendant. Greenham's friends often called him "Yoda"; thus, argued the state, the "Y" represented Greenham, the "F" was for Ferguson, and the "T" stood for Defendant. A search warrant served on Ferguson's residence also turned up $62,601. Approximately $200 was found at Greenham's apartment.

¶11 In his own defense, Defendant claimed to have made more than $100,000 as a confidential informant for the FBI. However, an agent for that agency testified that Defendant was only paid a total of $458. In addition, Defendant testified that his income included money made as a bounty hunter and gunsmith. However, Defendant only made $3,500 working for Don's Bail Bonds in 1993 and while working one month for A-1 Bail Bonds in 1994 was paid $1,600.

¶12 Based on this circumstantial evidence, a jury found Defendant guilty of felony murder for killing John Magoch. As required by statute, the trial judge conducted a special sentencing hearing. A.R.S. § 13-703.B. Under the Arizona system, this hearing is conducted without a jury — the judge makes the factual findings that determine whether the defendant is to be sentenced to life imprisonment or death. *Id.* Pursuant to a plea bargain[3] arranged after Defendant's

3. Greenham pled guilty to second-degree murder and two counts of armed robbery. At the time of the hearing, Greenham had yet to be sentenced, but expected to be imprisoned for 27.5 years.

jury verdict was received, Greenham testified at the sentencing hearing. Greenham admitted that he, Ferguson, and Defendant planned and executed the robbery. Greenham also testified that Defendant was the "leader because he laid out all the tactics," that Defendant shot the driver with a "Ruger . . . twenty-two rifle," and that, the day after the shooting, Defendant wanted to be "congratulate[d]" on his "shot." Reporter's Transcript ("R.T."), October 19, 1997, at 39, 44-45, 60.

¶13 In his special verdict, the trial judge found that Defendant "is the one who killed Mr. Magoch." Special Verdict, filed October 29, 1997, at 2. In addition, the judge determined that Defendant "was a major participant in the armed robbery of Mr. Magoch that resulted in him being killed and that the Defendant's conduct exhibited a reckless disregard for human life." *Id.* Finding the statutory aggravating circumstances of A.R.S. § 13-703.F.5 and 6 present, the judge stated that Defendant committed the offense "in expectation of the receipt of anything of pecuniary value" and "in an especially heinous, cruel or depraved manner." *Id.* at 3. These findings made Defendant eligible for a death sentence. A.R.S. § 13-703.F.5 & 6. While not finding the existence of any enumerated mitigating factors, the judge did acknowledge that Defendant's "minimal criminal record" was a mitigating factor. The judge then determined that the mitigating evidence, when weighed against the aggravating evidence, was insufficient to call for leniency and sentenced Defendant to death for the murder.

DISCUSSION

A. Trial issues

1. Suppression of wiretap evidence

¶14 The collection of wiretap evidence is governed by A.R.S. §§ 13-3001 – 13-3019. Defendant argues that, because normal investigative techniques were not exhausted, the affidavit supporting the necessity for electronic surveillance was deficient. In addition, Defendant claims that minimization requirements were not met. Thus, according to Defendant, the trial judge abused his discretion by not granting his motion to suppress. We review the denial of a motion to suppress for an abuse of discretion. *State v. Atwood*, 171 Ariz. 576, 603, 832 P.2d 593, 620 (1992).

a. Necessity

¶15 To satisfy the necessity requirement, an affidavit must state facts from which the judge may conclude that traditional methods have been tried and failed or are unlikely to succeed. A.R.S. § 13-3010.C.3; *State v. Hale*, 131 Ariz. 444, 447, 641 P.2d 1288, 1291 (1982). Conclusory statements or boilerplate recitations of difficulties inherent in any investigation do not satisfy the necessity requirement. *Id.* at 447, 641 P.2d at 1291. An affidavit in support of a wiretap order should be evaluated "in a commonsense and realistic, rather than a hypertechnical, manner." *Id.* at 446, 641 P.2d at 1230. The necessity requirement also "is to be interpreted in a commonsense fashion with an eye toward the practicalities of investigative work." *Id.* at 447, 641 P.2d

at 1231. Wiretaps should neither be "routinely used as the first step in criminal investigations" nor issued "in situations where conventional investigative techniques would be adequate to uncover the crime." *Id.* However, a wiretap does not have to be used "only as a last resort." *Id.*

¶16 Defendant claims that the state failed to exhaust normal investigative techniques before seeking electronic surveillance. Specifically, Defendant asserts that the state did not attempt to use undercover operations, informants, surveillance, or trash searches. While it is theoretically possible that other investigative techniques may have been successful, not all surveillance strategies must be exhausted before a wiretap application is appropriately granted. *State v. Politte*, 136 Ariz. 117, 129, 664 P.2d 661, 673 (App. 1982).

(1) The affidavit

¶17 Applying the foregoing principles to this case, we note first that when presenting the affidavit, the state submitted a detailed explanation of how other investigative procedures "have been tried and have failed, reasonably appear to be unlikely to succeed if tried, or are too dangerous to employ." Affidavit in Support of Application for Interception, January 8, 1995, at 17. As for surveillance, not only was it unsuccessful when used to monitor the activities of co-conspirator Greenham (who drove erratically and appeared to be watching for following vehicles) but, the affidavit alleged, the effectiveness of surveillance as an investigative tool would be limited because it "can only confirm meetings of people" and "does not provide the physical/verbal evidence needed for prosecution of the case." *Id.* at 8.

According to the affidavit, the use of informants would be unsuccessful because "[b]oth Ring and Greenham are very selective on who they deal with and both are known to be 'street smart' and will not openly discuss aspects of the case." *Id.* The only possible informant, Judy Espinoza, no longer had contact with Greenham and had resisted Defendant's attempts to contact her out of fear that she would be killed if it was suspected or discovered that she was providing information to the police. The state also felt that, because of Defendant's habit of carrying a firearm, it would be dangerous to attempt to introduce an informant.

¶18 The affidavit went on to state that, although considered, undercover operations were rejected because of Defendant's prior training as a police officer, familiarity with undercover operations, and current contacts with law enforcement agencies. Pen registers, which trap and trace the numbers dialed and received from certain telecommunications equipment, were employed to gather evidence against Defendant. But, like surveillance, their effectiveness was limited, as they simply established that contacts were made without revealing the content of the communications. A grand jury investigation was ruled out because it would likely not provide sufficient evidence to support a successful prosecution, would necessitate granting immunity to one of the co-conspirators, and would perhaps allow co-conspirators to flee the state, retaliate against witnesses, or destroy potential evidence.

¶19 Although the state conceded that probable cause for a search warrant of Defendant's home existed at the time of the wiretap application, its affidavit alleged that not all

co-conspirators had been identified; locations of much of the evidence also had not been deduced. In addition, execution of a search warrant would have prematurely alerted other conspirators and, because the stolen money had not been marked, it was believed that any money recovered would not be able to be conclusively traced to the robbery. The affidavit noted that all of the "very little physical evidence" collected at the crime scene, as well as leads procured from potential witnesses, had been exhausted. Interviewing Defendant or Greenham was discounted as it would alert them to their status as suspects and provide them time to conceal and destroy evidence, give them reason to flee, or allow them to retaliate against witnesses.

¶20 As demonstrated by these numerous and detailed facts, the affidavit in this case fully complied with the necessity requirement. The order authorizing the wiretap was therefore proper.

(2) Hearing on motion to suppress

¶21 At the hearing on Defendant's motion to suppress the wiretap evidence, Defendant also argued that it was unreasonable to allow the wiretap until trash covers were completed and the use of informants had failed. Defendant even offered the following people as possible infiltrators: 1) Judy Espinoza, an ex-girlfriend of Greenham and the person who initially implicated Defendant; 2) Michael Sanders, an acquaintance of Defendant and a possible suspect in the robbery; 3) Brian Robbins, who had previously participated in another armed robbery with Defendant, Greenham, and Sanders; and 4) James Gonzales, a former associate of Defendant in his bounty-hunting enterprise.

¶22 When ruling against the motion, the trial judge addressed each of these arguments specifically. He found a trash cover to be "a risky venture with little probability of success." Minute Entry ("M.E."), October 18, 1996, at 3. The judge found that Espinoza was an "unreasonable" option because she "was afraid of [Defendant] and had effectively cut off all ties with both [Defendant] and Greenham." *Id.* at 2. The judge considered Sanders to be similarly unsuitable because he was on federal probation, had prior felony convictions, demanded a weapon if he met with Defendant, and told police he would, if he perceived danger, "take out" Defendant with a "preemptive strike." *Id.* The judge also found Defendant's arguments regarding Robbins and Gonzales "equally unconvincing." *Id.* at 3. Robbins could not pass a polygraph examination and asked for immunity for another armed robbery. Gonzales had been "kicked out of the group" months before and had not been in contact with Defendant since that time. *Id.*

¶23 Based on these well-articulated reasons, and considering the detail of the affidavit, the judge did not abuse his discretion in denying Defendant's motion to suppress on necessity grounds.

b. Minimization

¶24 Our statute requires that wiretaps be "conducted in such a way as to minimize interception of communications not otherwise subject to interception." A.R.S. § 13-3010.D.6. In determining whether monitoring agents comply with these minimization requirements, Arizona has followed the standard articulated in *Scott v. United States*, 436 U.S. 128,

98 S.Ct. 1717 (1978). *State v. Olea*, 139 Ariz. 280, 285, 678 P.2d 465, 470 (App. 1983). That standard requires an "objective assessment of the reasonableness of the monitoring agents' actions in light of all of the facts and circumstances confronting them at the time." *Id.* According to *Olea*, the following three factors should be considered in determining the objective reasonableness of the minimization attempt: 1) the investigation's nature and scope, 2) the government's reasonable expectations of the conversations' character, and 3) the extent of judicial supervision over the surveillance. *Id.*

¶25 Here, the wiretaps were instituted with the intent of uncovering the scope of the conspiracy, more specific details about the crime, and the location of valuable, as-yet-to-be-discovered evidence, as well as preventing furtherance of the conspiracy and identifying the third conspirator. The request was based on expectations that "persons involved in a criminal conspiracy use telephones" toward such ends and that one potential informant had already heard Defendant "use the phone to talk about the incident." Affidavit in Support of Application for Interception, January 8, 1995, at 22-23. A detailed "Wire Interception Minimization Guidelines" was read and signed by every agent involved in the monitoring. These guidelines gave specific instructions to the monitoring agents on how to legally perform their duties, including when to terminate calls that could possibly fall under a privilege. Approximately every ten days the officers in charge of minimization submitted detailed, extensive reports to the judge who issued both the initial and continuing orders for communication interceptions. These reports detailed the number of calls intercepted, with

a summary of the times and types of calls intercepted, as well as any malfunctions or other problems encountered. The reports also detailed both the evidence acquired and what was still being sought. In addition, the reports articulated the reasons for continued interception.

¶26 The facts establish careful investigative work. Although Defendant cites a few specific instances of non-minimization to support his claim that this case constitutes a significant violation of the minimization requirements, we must look to the totality of the circumstances to determine the reasonableness of the state's minimization attempts. *Olea*, 139 Ariz. at 285, 678 P.2d at 470. After analyzing the objective reasonableness of the monitor's actions within the context of the facts of this case, we agree with the trial judge when he stated:

> The contention that all the wiretaps must be suppressed because the monitors did not adequately minimize interception of the calls is without merit. The overwhelming number of calls were very short thus precluding any minimization. Additionally, the members of this group consistently jumped from topic to topic during their conversations. Moreover, the extent of the organization, and the possible involvement of others such as [Defendant's] wife, greatly hampered any reasonable and consistent effort to minimize interception of phone calls. Finally, under all of the circumstances, the police exercised reasonable efforts to minimize interception of non-relevant or privileged calls.

M.E., October 18, 1996, at 4. We conclude that the judge did not abuse his discretion in denying Defendant's motion to suppress.

2. Third-party defense evidence

¶27 Defendant argues that the trial judge's rulings prohibiting the introduction of evidence that a third party, Michael Sanders, committed the crime were errors requiring reversal. Again, we review the trial judge's decisions for abuse of discretion. *State v. Tankersley*, 191 Ariz. 359, 369 ¶ 37, 956 P.2d 486, 496 ¶ 37 (1998).

¶28 Although a defendant may introduce evidence that shows that another person committed the crime for which the defendant is charged, the trial judge may exclude such evidence if it "simply affords a possible ground of suspicion against another." *Id.* at ¶ 38 (quoting *State v. Oliver*, 169 Ariz. 589, 590, 821 P.2d 250, 251 (App. 1991)). For third-party defense evidence to be admitted at trial, the defendant must demonstrate that the evidence has an "inherent tendency" to connect the third party to the "actual commission" of the crime. *Id.*; *see also State v. Fulminante*, 161 Ariz. 237, 252, 778 P.2d 602, 617 (1988).

¶29 Before trial, the state filed a motion to preclude Defendant from introducing evidence that anyone other than Defendant, Greenham, and Ferguson committed the charged crimes. Defendant's response challenged the motion as being "overly broad," "burdensome," and "highly prejudicial" to Defendant because granting the motion "would leave Defendant without a defense." Defendant's Response to

State's Motion to Preclude Third Party 404(B) Evidence and Defense, filed July 25, 1996, at 4, 8-9. Defendant then filed a supplement to his response, including an offer of proof, in which he asserted that evidence existed that other persons not named as defendants participated in and/or committed the alleged criminal offenses. Specifically, Defendant claimed that Sanders "precisely described" the manner in which the robbery and murder were committed, was an hour late to work on the day of the crimes, met with a detective from the Glendale Police Department seeking immunity from both the present and additional crimes in exchange for information, admitted that he would have "no problem" killing someone under the "right" circumstances, and was a convicted felon with a prior violent criminal history. In addition, Defendant asserted that the police maintained surveillance of Sanders for the specific purpose of determining the extent of Sanders' involvement in the crimes even after Defendant and his co-conspirators were arrested.

¶30 After taking the motion under advisement, the trial judge granted the state's request to preclude evidence that Sanders committed the crime. The judge noted that "the evidence shows Sanders may have been involved in the planning of the armed robbery. However, the evidence does not have an inherent tendency to *connect* Sanders with the commission of the offense." M.E., October 18, 1996, at 10. In addition, the judge stated that "[w]ithout more specifics, it is difficult to determine what evidence [Defendant] wishes to present." *Id.*

¶31 While cross-examining one of the state's witnesses, Defendant asked the witness whether he was "personally

familiar" with Michael Sanders. The state objected and, out of the presence of the jury, Defendant stated that "as long as the defense can make the nexus," he was allowed to "go into that area." R.T., November 19, 1996, at 84. Defendant was apparently attempting to elicit evidence that a witness remembered seeing a man who resembled Sanders in the vicinity of the van two route stops before the scene of the crime. The trial judge reminded Defendant that he must "prove the connection" between Sanders and either the planning or commission of the crimes, as well as present it to the court "out of the presence of the jury," before he would allow the evidence to be admitted. Pressed by Defendant, the judge described the type of necessary "nexus" as follows:

> If [Defendant can] show that [Sanders] participated in the planning and talk about the robbery and then you have, you have what is arguably his identification at the scene, or as the cars are being driven away, I said I think in my mind, that may be enough to prove the connection, or the nexus for you to pursue the defense and to argue it to that jury.

Id. at 94. Defendant did not attempt to assert the third-party defense again during the remainder of the trial.

¶32 Arguably, Defendant's evidence regarding Sanders was relevant to establish that Sanders was involved in the planning of the crimes. But while the evidence Defendant claims he may have produced about Sanders might implicate Sanders as a participant in the planning of the crimes, it would not have exculpated Defendant for his role in both planning

and committing the crimes. Based on this important distinction, there was no abuse in the trial judge's decision to reject the third-party defense evidence. Because implicating Sanders would not tend to exculpate Defendant, we conclude that even if it was error to preclude the evidence regarding Sanders, the error did not, beyond a reasonable doubt, contribute to or affect the verdict. *State v. Fulminante*, 193 Ariz. 485, 500 ¶ 49, 975 P.2d 75, 90 ¶ 49 (1999). Therefore, given the facts of this case, any error is harmless. *Id.*

3. New trial motion

¶33 Defendant claims that the trial judge abused his discretion when he denied Defendant's new trial motion. Defendant specifically argues that a new trial should have been granted based on the FBI's failure to provide Defendant's entire FBI file and the state's failure to disclose both a witness' pre-hypnotic videotape testimony and evidence supporting Defendant's third-party defense. Only the first of these three issues was raised in Defendant's *timely* new trial motion. Ariz.R.Crim. P. 24.1.b ("A motion for new trial shall be made no later than 10 days after the verdict has been rendered."). Several claims, including the other two issues argued by Defendant here, were raised in subsequent *untimely* new trial motions.[4] The trial court has no jurisdiction

4. The verdicts in Defendant's case were rendered on December 6, 1996. Defendant timely filed a new trial motion by December 16, 1996. Almost a year later, on September 15, 1997, Defendant filed a "supplemental" motion for new trial. Both the next day, and two days after that, Defendant again filed supplemental new trial motions. (Cont'd)

to grant a new trial motion if it is not made within ten days after the verdict. *State v. Hickle*, 129 Ariz. 330, 332, 631 P.2d 112, 114 (1981). Because the trial judge did not have jurisdiction to consider Defendant's claims raised in an untimely new trial motion, those redundant claims will not be addressed by this court on appeal. Of course, Defendant can raise these claims in post-conviction relief proceedings pursuant to Ariz.R.Crim.P. 32.1 *et seq*. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). Therefore, only the first issue needs to be examined: Whether the trial judge should have granted a new trial based on the fact that Defendant did not receive his entire FBI file.

¶34 In making this argument, Defendant relies on Ariz.R.Crim.P. 24.1.C.5, which states that the trial judge may grant a new trial when "[f]or any other reason not due to the defendant's own fault the defendant has not received a fair and impartial trial." Defendant claims that, without the entire file, he was unable to support his claim that the money found in his home was compensation for his work as an FBI informant or to refute the trial testimony of an FBI agent that Defendant was never paid substantial amounts of money as an informant.

¶35 Defendant bases his argument on a discrepancy between the size of the file forwarded to him before trial from the

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(Cont'd)
Labeling untimely motions as supplemental does not enable a party to avoid the time restrictions imposed by procedural rules — especially those rules, such as Ariz.R.Crim.P. 24.1.b, that confer jurisdiction on the trial court. *State v. Hickle*, 129 Ariz. 330, 332, 631 P.2d 112, 114 (1981).

FBI, which was approximately 20-25 pages, and trial testimony from an FBI agent that Defendant's file is "about two inches thick." R.T., October 9, 1997, at 5; R.T., December 4, 1996, at 36. First, we must recognize that the FBI agent may have inadvertently misstated or simply overestimated the size of Defendant's file. If, however, Defendant is correct about the actual size of his file, then he has failed to demonstrate that his receipt of only a portion of his FBI file was due to anyone's fault but his own. Upon receipt of what was to Defendant an obviously incomplete file (which Defendant would have realized when information about the activities he claims should have been in the file was discovered missing), Defendant should have acted to procure the entire file. Instead, Defendant apparently waited until trial and used the alleged discrepancy to argue that the FBI was unwilling to proffer the entire file as part of a more general cover-up or conspiracy theory. Unsuccessful with that argument, Defendant waited until filing a new trial motion to complain that, based on no fault of his own, he did not receive the entire FBI file and the incomplete disclosure precluded him from properly procuring a defense. Based on this reasoning, Defendant has not satisfied the necessary requirement that he have no responsibility in the alleged trial taint. *See* Ariz.R.Crim.P. 24.1.C.5. In addition, trial testimony demonstrated that it would be unlikely that the FBI file would corroborate Defendant's claims.[5]

¶36 At trial, Agent Michael Fain of the FBI's Phoenix office testified that the total amount given to Defendant for his

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5. Our disposition of this issue does not preclude Defendant from raising it as a *Brady* claim in post-conviction relief proceedings pursuant to Ariz.R.Crim.P. 32.1. *See supra* ¶ 33.

services as an informant was $485. Fain also testified that he was the only individual, and the Phoenix office the only office, to have "administrative control" of any informant operating in the Phoenix area. R.T., November 20, 1996, at 47. Thus, according to Fain's testimony, no other FBI agent would have paid Defendant to work as an informant.

¶37 Defendant later took the stand and controverted Fain's testimony. Defendant claimed that he performed many services for the FBI and was paid "a total of about a hundred and five thousand dollars," all of which was paid in cash. R.T., December 12, 1996, at 162. On cross-examination, Defendant stated that "the majority of the income" he made from the FBI, including the $105,000, was not paid through Agent Fain but by an Agent Dan Steel. Defendant claimed to have been paid $35,000, $45,000, and $25,000 by Agent Steel for three separate assignments in Mexico. Although many of Defendant's prior, documented meetings with the FBI included the presence of other persons, Defendant claimed to have completed his Mexico assignments with anonymous contacts and to have always met with Agent Steel alone.

¶38 To rebut this testimony the state called Special Agent Mark Tanner, an assistant special agent in charge of Phoenix. Tanner described the process implemented to pay informants, which included issuing checks to agents (who in turn cash the checks and pay the informants in cash), returning receipts for payment, and acquiring permission from headquarters for any amount in excess of $20,000. Tanner testified that it would not be possible for an agent to get money without following the procedure. Tanner also denied that Defendant

was ever paid in excess of $20,000. Finally, Tanner told the jury that he had never known an Agent Dan Steel, that an agent with that name did not work in the Phoenix division, and, to his knowledge, no agent by that name had ever visited Phoenix.

¶39 Defendant's alleged inability to access his entire FBI file did not render his trial so unfair as to require the granting of a new trial. Therefore, the trial judge did not abuse his discretion in denying Defendant's new trial motion.

B. Sentencing issues

1. Constitutional challenge

¶40 Defendant argues that, in light of the United States Supreme Court's decisions in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), Arizona's capital sentencing scheme violates the Sixth and Fourteenth Amendments to the United States Constitution. In response to Defendant's claims, the state counters that *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990), which approved Arizona's present judge-sentencing procedure for capital cases, is still the controlling authority on point. While the state is correct in noting that neither *Jones* nor *Apprendi* overruled *Walton*, we must acknowledge that both cases raise some question about the continued viability of *Walton*. Of course, it could also be said that because a majority of the Court refused to expressly overrule *Walton*, the apparent scope of *Apprendi* and *Jones* is not as broad as some of the language of the two opinions suggests. The unclear language

of the Court's *Apprendi* and *Jones* opinions makes either of these interpretations reasonable and, therefore, we believe the practical operation of Arizona's death penalty scheme, as applied under the peculiar facts of the present case, requires some further explication.

¶41 The background is this: While upholding a federal carjacking statute, the *Jones* Court reasoned that "diminishment of the jury's significance by removing control over facts determining a statutory sentencing range" would violate the Sixth Amendment. 526 U.S. at 248, 119 S.Ct. at 1226. *Apprendi*, a case involving the charge of unlawful possession of a firearm, presented the question of whether proof of a so-called hate crime motive was a sentencing factor or an element of the crime. 530 U.S. at 471, 120 S.Ct. at 2352. In *Apprendi*, the majority held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. at 2362-63. The majority, citing *Walton*, went on to reject the argument that *Apprendi* might jeopardize a capital sentencing scheme like Arizona's by describing such a scheme as a system that merely "requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death," and not as a system that "permits a judge to determine the existence of a factor which makes a crime a capital offense." *Id.* at 496-97, 120 S.Ct. at 2366 (internal citation omitted). In dissent, Justice O'Connor challenged the majority's rationale as follows:

> The distinction of *Walton* offered by the Court today is baffling, to say the least. The key to that distinction is the Court's claim that, in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence. As explained above, that claim is demonstrably untrue. A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty. . . . . If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.

Id. at 538, 120 S.Ct. at 2388 (citations and internal quotations omitted).

¶42 In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings. The range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for "natural life" without the possibility of release. A.R.S. § 13-703.A-E. It is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death. A.R.S. § 13-703.B ("The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution

of the United States or this state."). And even then a death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt. *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983); *see also* A.R.S. § 13-703.E ("the court . . . shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated"). Thus, when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present. The judge makes that finding on the basis of the evidence presented at trial and any other evidence presented at the aggravation/mitigation hearing. A.R.S. § 13-703.C. If the judge finds an aggravating circumstance, he must then proceed to determine if there are any mitigating circumstances. A.R.S. § 13-703.E. If the judge finds mitigating circumstances, he must then weigh them against the aggravators and decide by "special verdict" whether a death sentence is appropriate. A.R.S. § 13-703.D & E.

¶43 Therefore, the present case is precisely as described in Justice O'Connor's dissent — Defendant's death sentence required the judge's factual findings. Specifically, the trial judge in this case made the necessary factual finding to support the aggravating circumstance that the killing was heinous and depraved. *See* A.R.S. § 13-703.F.6. That finding was based solely on Greenham's testimony at the separate sentencing hearing and was never heard by the jury.

¶44 We recognize that the United States Supreme Court has explicitly refrained from overruling *Walton*.

See, e.g., *Apprendi*, 530 U.S. at 496, 120 S.Ct. at 2366 ("[T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.") (citing *Walton*, 497 U.S. at 647-49, 110 S.Ct. at 3054-55); *Jones*, 526 U.S. at 250, 119 S.Ct. at 1228. Although Defendant argues that *Walton* cannot stand after *Apprendi*, we are bound by the Supremacy Clause in such matters. Thus, we must conclude that *Walton* is still the controlling authority and that the Arizona death-penalty scheme has not been held unconstitutional under either *Apprendi* or *Jones*. Putting aside Defendant's constitutional challenge to Arizona's death penalty scheme, we turn to the other sentencing issues he raises.

2. Actual killer/*Enmund-Tison* finding

¶45 Defendant claims that the trial judge erred in finding that Defendant killed Magoch because the "sole proof" supporting such a finding was the testimony of Greenham, a person who lacked credibility. For the same reasons, Defendant also claims that insufficient evidence existed to support the trial judge's *Enmund/Tison* finding. *See Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982); *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987).

¶46 Only six of the twelve jurors found Defendant guilty of premeditated murder. However, the jury unanimously found Defendant guilty of felony murder. Because Defendant was convicted of only felony murder, we must ascertain whether

he is death eligible. In *Enmund*, the United States Supreme Court held that a felony murder defendant could receive the death penalty only if he actually killed, attempted to kill, or intended to kill. 458 U.S. at 797, 102 S.Ct. at 3376. The Court's subsequent decision in *Tison* expanded this rule, allowing capital punishment when the defendant was a major participant in the underlying felony and acted with reckless indifference to human life. 481 U.S. at 157-58, 107 S.Ct. at 1688.

¶47 In his special verdict, the trial judge here found that:

> the Defendant is the one who killed Mr. Magoch. The evidence also clearly established beyond a reasonable doubt that the Defendant was a major participant in the armed robbery of Mr. Magoch that resulted in him being killed and that the Defendant's conduct exhibited a reckless disregard for human life.

Special Verdict, at 2.

¶48 Without Greenham's testimony at the sentencing hearing, we conclude that the evidence admitted at trial failed to prove, beyond a reasonable doubt, that Defendant was a major participant in the armed robbery or that he actually murdered Magoch. The presence of $270,000 in Defendant's garage, scraps of paper written by Defendant regarding other armored car routes and "splits" of money, and intercepted phone calls between Defendant, Ferguson, and Greenham only proved that Defendant helped plan the robbery. None of it, however, linked Defendant to the act of killing Magoch.

In addition, although there was evidence that Defendant's truck may have been used in the robbery, no trial evidence ever placed Defendant at the scene. A rifle with an attached homemade silencer was recovered from Defendant's garage; yet that weapon was never conclusively connected to the murder. Although the trial evidence established Defendant's participation in planning the robbery and his further participation in concealing the proceeds from the crime, it provided almost nothing about why Magoch was killed or who carried out the murder. There also was no evidence at trial to establish even reckless indifference. For all we know from the trial evidence, Defendant did not participate in, plan, or even expect the killing. This lack of evidence no doubt explains why the jury found Defendant guilty of felony, but not premeditated, murder.

¶49 When imposing sentence in a capital case, the trial judge does not rely exclusively on the evidence admitted at trial but also takes into consideration the evidence presented at the sentencing hearing. A.R.S. § 13-703.E. Given Greenham's testimony that he, Ferguson, and Defendant "planned on robbing an armored car," that Defendant had "taken the role as leader," and Defendant "shot Mr. Magoch," the trial judge's finding is supported. R.T., October 19, 1997, at 38-40.

3. Aggravating factors

a. Heinousness and depravity

¶50 Defendant challenges the trial judge's finding of the aggravating circumstance that Defendant murdered Magoch

in a heinous or depraved manner. A.R.S. § 13-703.F.6. At the sentencing hearing Greenham stated that when he, Defendant, and Ferguson met the day after the robbery to count the stolen money, the three were in a "pretty happy mood" because they "had all the money." R.T., October 9, 1997, at 59. In addition, although Greenham said he was "distraught because Mr. Magoch was dead," he testified that Defendant stated in an "offhand" manner, "you guys are forgetting something . . . you're forgetting to congratulate me on my shot." It is exclusively from this testimony that the trial judge based his finding that Defendant "did not appreciate the seriousness of his conduct," "took great liking or enjoyment in his actions," displayed "an abhorrent lack of regard for human life," and "seemed to savor or enjoy the murder." Special Verdict, at 4. In short, the judge believed Defendant "relished" the murder. Although the judge noted that he was "mindful in determining the facts as to this statutory aggravating circumstance" that Greenham's "credibility as a witness is an issue" and that Greenham's "statement is uncorroborated," he nonetheless "resolve[d] that Mr. Greenham is credible." *Id.* at 3. Relishing a victim's death is one of the enumerated *Gretzler* factors that will support a finding of heinousness or depravity. 135 Ariz. at 52, 659 P.2d at 11.

¶51 Defendant argues that uncorroborated testimony from an accomplice that he celebrated is insufficient evidence to support a finding of relishing. *See State v. Smith*, 138 Ariz. 79, 86, 673 P.2d 17, 24 (1983). Even assuming Greenham's testimony was credible, Defendant says the statements attributed to him merely demonstrate that he is a callous individual, indifferent to human life, who was impressed with

his marksmanship. Defendant was a promising competitive shooter, had extensive firearms training, and even assisted as a firearms instructor for correctional officers. Therefore, Defendant argues, his comment was merely an expression of pride over his marksmanship.

¶52 The analysis of heinousness and depravity "focus[es] on the defendant's mental state and attitude as reflected by his words and actions." *State v. Brewer*, 170 Ariz. 486, 502, 826 P.2d 783, 799 (1992). In addition, post-murder behavior is relevant when it provides evidence of the killer's state of mind at the time of the offense. *State v. Greene*, 192 Ariz. 431, 440 ¶ 39, 967 P.2d 106, 115 ¶ 39 (1998). Although a perpetrator's cold and deliberate actions may establish the requisite intent for the crime of first-degree murder, they do not demonstrate heinousness or depravity and are of no consequence in making the sentencing decision. *State v. Smith*, 146 Ariz. 491, 504, 707 P.2d 289, 302 (1985). Statements suggesting indifference constitute relishing only when they indicate that the killer savored or enjoyed the murder. *Greene*, 192 Ariz. at 440-41 ¶ 39, 967 P.2d at 115-16 ¶ 39.

¶53 Although Defendant's statements reflect a calculated plan to kill, satisfaction over the apparent success of his plan, and an extreme callousness or lack of remorse after the murder, the evidence does not support a finding that Defendant actually relished the *act* of murdering Magoch. Thus, the statements do not demonstrate that Defendant's state of mind during the time of the offense was heinous or depraved.

¶54 The state argues that because the armored car could have been robbed without killing Magoch, the murder was senseless and we can independently uphold the trial judge's finding of depravity and heinousness based on the senselessness of the crime. The murder of a victim when it was unnecessary to carry out the robbery may be senseless. *State v. Medina*, 193 Ariz. 504, 514 ¶ 39, 975 P.2d 94, 104 ¶ 39 (1999). The state asserts that Defendant could have seized the armored van without killing Magoch, whom the state claims was standing outside the van. However, there was no testimony offered at trial that supported this argument except that Magoch, who was a smoker, had a tendency to open the van's driver-side door for ventilation while he smoked because the windows in the van did not roll down. Indeed, no trial testimony substantiated the state's theory that this was the situation at the time the armored van was taken. In contrast, Greenham testified at the sentencing hearing that, on the day of the robbery, Magoch had "opened his door about six to eight inches" to smoke a cigarette. R.T., October 9, 1997, at 45. According to Greenham, Magoch was turned sideways in his seat with the van door slightly open, only his head was outside of the van, and his feet were resting on "the little van ledge." *Id.* at 78. In such circumstances, it is possible the perpetrators believed that, absent a potentially protracted and boisterous struggle, successfully subduing Magoch or gaining access to the vehicle was improbable without killing him first. While none of these grisly speculations justify or mitigate the crime, they do illustrate that the entire inquiry is pointless. Any murder is senseless in its brutality and finality. Yet not all murders are senseless as this term is used to distinguish those first-degree murders that deserve a death sentence and those that

do not. We classify the senselessness of Magoch's death in this case as one of the latter.

¶55 Finally, senselessness alone cannot support a heinous/depraved finding. *State v. Lee*, 189 Ariz. 590, 605-06, 944 P.2d 1204, 1219-20 (1997). Indeed, in previous robbery cases in which we have upheld a death sentence based on senselessness, senselessness has been present as a makeweight in combination with other aspects of heinousness and depravity. *See, e.g.*, *Medina*, 193 Ariz. at 514 ¶ 41, 975 P.2d at 104 ¶ 41 (relishing, gratuitous violence, and helplessness); *State v. Hyde*, 186 Ariz. 252, 282, 921 P.2d 655, 685 (1996) (helplessness and gratuitous violence); *State v. Jackson*, 186 Ariz. 20, 30, 918 P.2d 1038, 1048 (1996) (helplessness and relishing); *State v. Runningeagle*, 176 Ariz. 59, 65, 859 P.2d 169, 175 (1993) (helplessness and relishing); *State v. Spencer*, 176 Ariz. 36, 43, 859 P.2d 146, 153 (1993) (needless mutilation of victim); *State v. Comer*, 165 Ariz. 413, 429, 799 P.2d 333, 349 (1990) (relishing, gratuitous violence, and helplessness); *State v. Correll*, 148 Ariz. 468, 481, 715 P.2d 721, 734 (1986) (gratuitous violence and helplessness).

¶56 We conclude that the evidence in this case does not support a finding of depravity or heinousness beyond a reasonable doubt. Therefore, the trial judge's finding of the heinous and depraved factor is disapproved.

b. Pecuniary gain

¶57 To prove pecuniary gain as an aggravating factor the state must demonstrate that the motivation for the murder

was the expectation of financial gain. *State v. Trostle*, 191 Ariz. 4, 17-18, 951 P.2d 869, 882-83 (1997). Here, killing Magoch was for no other comprehensible reason than to facilitate the robbery. When making his finding in the special verdict, the trial judge stated:

> The evidence clearly shows beyond a reasonable doubt that Mr. Magoch was killed in order to obtain the approximately one-half million dollars in cash in the armored car. Taking the cash from the armored car was the motive and reason for Mr. Magoch's murder and not just the result.

Special Verdict, at 3. Under the facts of this case, including Greenham's testimony, the trial judge's finding is "clearly warranted." *Cf. State v. Poland*, 144 Ariz. 388, 406, 698 P.2d 183, 201 (1985). Therefore, the trial judge's application of the pecuniary gain aggravating factor is supported.

¶58 Defendant claims, in both his brief and again at oral argument, that A.R.S. § 13-703.F.4 and 5 make the buying and selling of murder an aggravating factor and that one should not be put to death for the "common sin of greed." Arguably, there once was "considerable disagreement" as to the meaning of subsection F.5. *Greene*, 192 Ariz. at 445 ¶ 69 n.1, 967 P.2d at 120 ¶ 69 n.1 (Zlaket, C.J., dissenting). However, this court has long interpreted F.5 to include any murder in which pecuniary gain was a motive, cause, or impetus and not merely the result of the killing. *State v. Kayer*, 194 Ariz. 423, 433 ¶ 32, 984 P.2d 31, 41 ¶ 32 (1999). In addition, we do not consider the planned robbery and murder of an armored car driver to be simply a result of the "common sin of greed." Defendant's argument is without merit.

4. Mitigating factors

a. Lack of prior criminal history

¶59 In his special verdict, the trial judge did not find the presence of any statutory mitigating circumstances and determined that only one unenumerated mitigating circumstance existed: Defendant's minimal criminal record. Apparently, neither Defendant nor his attorney presented much mitigating evidence to the court because, as Defendant's attorney explained during the sentencing hearing, it was believed that:

> The sole issue in this case is going to be for the Court to determine whether or not the State has proven [Defendant's] participation and the extent of that participation beyond a reasonable doubt; i.e., did he or did he not personally kill John Magoch in this case.

R.T., October 20, 1997, at 7. Addressing this issue in his special verdict, the trial judge noted:

> This Court rejects that the Defendant has proved by a preponderance of the evidence that Mr. Greenham, and not the Defendant, was the shooter or that the Defendant was not at the scene of the robbery/murder regardless of who else may have been present and shot Mr. Magoch.

Special Verdict, at 5.

¶60 On appeal, Defendant argues that the judge failed to give sufficient weight to Defendant's minimal criminal record, especially in light of Defendant's previous work as a bounty hunter, police and correctional officer, and confidential informant. Although Defendant does not have any prior felony convictions, he does have two prior misdemeanor convictions for carrying a concealed weapon and impersonating a public servant arising out of a bounty-hunting incident in 1993. In addition, Defendant's employment as a police officer was less than exemplary. The chief of the police department at which Defendant was employed for approximately a year stated that Defendant was fired for insubordination when he refused to respond to a homicide scene in favor of engaging in a high-speed chase. As for Defendant's experiences as a correctional officer, bounty hunter, and confidential informant, it is difficult to imagine how these jobs serve as mitigating circumstances. Instead, because Defendant abused his law-enforcement experience and contacts before and after the crimes — to plan and execute the murder, as well as to attempt to avoid capture — these facts, even if mitigating, are entitled to minimal weight.

b. Other possible mitigation evidence

¶61 Because Defendant claims to have not participated in the crime at all, the statutory mitigating circumstance of minor participation is inapplicable. A.R.S. § 13-703.G.3. Nevertheless, the evidence would not support such a finding. Although Defendant continues to insist on his complete innocence, when a defendant is found guilty beyond a reasonable doubt, unsupported and unfounded claims of

actual innocence do not constitute mitigation for sentencing purposes. *State v. Amaya-Ruiz*, 166 Ariz. 152, 179, 800 P.2d 1260, 1287 (1990). Even if residual doubt is a mitigating circumstance, on this record we are left with no residual doubt about Defendant's guilt. In addition, no other evidence exists in the record to merit leniency.

5. Independent reweighing

¶62 We have determined that the trial judge incorrectly found the aggravating factor of heinousness and depravity. *See supra* ¶ 56. When the trial judge errs in aggravation or mitigation findings, remand is generally not appropriate unless the judge wrongly excluded evidence or the record does not adequately reflect all of the relevant facts. A.R.S. § 13-703.01.C. Neither situation is present here. In his special verdict, the trial judge added the following:

> The Court specifically notes that had the State proved beyond a reasonable doubt only [the] statutory aggravating circumstance [of pecuniary gain] that there remains still no mitigating circumstances sufficiently substantial to call for leniency. This was a cold-blooded, very calculated and premeditated murder to facilitate the robbery of thousands and thousands of dollars. The evidence is overwhelming that the Defendant was a principal, chief participant in the whole scheme.

Special Verdict, at 5-6.

¶63 We have previously upheld the death penalty in a case in which pecuniary gain was the only aggravating

circumstance. *See State v. Hensley*, 142 Ariz. 598, 603-04, 691 P.2d 689, 694-95 (1984) (defendant was sentenced to death after shooting three people in the course of robbing a bar; only mitigating circumstance was that defendant had obtained a G.E.D.). After our independent review, we conclude that even crediting Defendant's minimal criminal record, the mitigating evidence is not sufficient to call for leniency in light of the facts of this case. This murder was not the result of sudden impulse or loss of control nor a robbery gone bad but a planned, ruthless robbery and killing.

C. Alleged constitutional defects raised to avoid preclusion

¶64 Defendant brings numerous constitutional challenges to Arizona's death penalty scheme to avoid potential procedural default and preserve review. We have previously addressed the challenges as follows:

> Requirement that mitigating circumstances be proven by a preponderance of the evidence improperly precludes certain mitigating facts, rejected in *State v. White*, 194 Ariz. 344, 355 ¶ 49, 982 P.2d 819, 830 ¶ 49 (1999).
>
> Arizona's death penalty statute is unconstitutional on its face and as applied, rejected in *id.*; *State v. Schackart*, 190 Ariz. 238, 260, 947 P.2d 315, 337 (1997); *but see supra* ¶¶ 40-44.
>
> Arizona's death penalty statute is unconstitutional because it requires death when, in the absence of any mitigating circumstances, only one aggravating circumstance is found, rejected in *State v. Van Adams*, 194 Ariz. 408, 422 ¶ 55, 984 P.2d 16, 30 ¶ 55 (1999).
>
> Arizona's death penalty statute is unconstitutional because defendants do not have an opportunity to death qualify the sentencing judge, rejected in *White*, 194 Ariz. at 355 ¶ 49, 982 P.2d at 830 ¶ 49.
>
> Arizona's death penalty statute fails to provide proper guidance to the sentencing judge, rejected in *Van Adams*, 194 Ariz. at 422 ¶ 55, 984 P.2d at 30 ¶ 55.
>
> Arizona's death penalty statute is unconstitutional as it requires a defendant to prove that his life should be spared, rejected in *id.* at 423 ¶ 55, 984 P.2d at 31 ¶ 55.
>
> Arizona's death penalty statute is unconstitutional as it fails to sufficiently channel the sentencing judge's discretion, rejected in *id.*
>
> Arizona's death penalty statute is unconstitutional because it fails to require the state to prove that a sentence of death is appropriate, rejected in *id.*
>
> The lack of proportionality review is a due process violation, rejected in *id.*

Appendix A

Arizona's death penalty statute is unconstitutional because it does not require the sentencing judge to find that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, rejected in *White*, 194 Ariz. at 355 ¶ 49, 982 P.2d at 830 ¶ 49.

Arizona's death penalty statute is unconstitutional because it fails to provide a defendant the means to voir dire the sentencing judge, rejected in *id.* at 356 ¶ 49, 982 P.2d at 831 ¶ 49.

CONCLUSION

¶65 For the foregoing reasons, we affirm Defendant's convictions and sentences.

_____

STANLEY G. FELDMAN, Justice

CONCURRING:

_____

THOMAS A. ZLAKET, Chief Justice

_____

CHARLES E. JONES, Vice Chief Justice

_____

RUTH V. McGREGOR, Justice

Appendix A

MARTONE, Justice, concurring in the judgment.

¶66 While I join the court in affirming the convictions and sentences, I write separately to explain why I do not join part B(1) and paragraph 48 of part B(2) of the court's opinion.

I.

¶67 In part B(1), the court says "we must acknowledge that both cases [*Jones* and *Apprendi*] raise some question about the continued viability of *Walton*." *Ante*, ¶ 40. The court goes on to say it must explain Arizona's death penalty scheme because of the "unclear language of the Court's *Apprendi* and *Jones* opinions." *Id.* But *Apprendi* was quite express in distinguishing *Walton*. The opinion states that "this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." *Apprendi v. New Jersey*, 530 U.S. 466, 496, 120 S.Ct. 2348, 2366 (2000). The Court noted that the judge does not determine the existence of a factor which makes a crime a capital offense. Rather, the statute itself defines first degree murder as a capital offense. The jury finds the defendant guilty of all of the elements of first degree murder. "[I]t may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed." *Id.*, 120 S.Ct. at 2366 (citation omitted).

¶68 The majority seizes upon language in the *Apprendi* dissent to question *Walton*. But the dissent in *Apprendi* was

not a challenge to *Walton*. Instead, it was a challenge to the majority holding in *Apprendi*. The *Apprendi* dissent acknowledged that the *Apprendi* majority likely held "that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt only if that fact, as a formal matter, extends the range of punishment *beyond the prescribed statutory maximum*." 530 U.S. at 540, 120 S.Ct. at 2389 (O'Connor, J., dissenting) (emphasis in original). Justice O'Connor noted that because A.R.S. § 13-1105(C) "itself authorizes both life imprisonment and the death penalty," *id.*, 120 S.Ct. at 2389, the statute authorizes the maximum penalty of death in a formal sense.

¶69 In this case, Ring's punishment was not above the statutory range allowed by the jury's guilty verdict. Death is plainly within the statutory range of a guilty verdict for first degree murder. A.R.S. § 13-1105(C). Such a verdict is essential to a finding that a defendant is death eligible. Only first degree murder is a capital offense. One cannot be sentenced to death without such a verdict. The jury must find all the elements of the charge under *Apprendi* and the Sixth Amendment. The factual findings in aggravation and mitigation made by the trial court are not elements of the charge triable by jury under the *Sixth* Amendment, but rather, capital sentencing limitations driven by the *Eighth* Amendment. *Walton v. Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 3054-55 (1990).[1]

1. The Court explained in *Walton:*

> Walton also suggests that in Florida aggravating factors are only sentencing "considerations" while in

(Cont'd)

(Cont'd)

> Arizona they are "elements of the offense." But as we observed in *Poland v. Arizona*, an Arizona capital punishment case: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (*i.e.*, require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (*i.e.*, preclude the death penalty)." Our holding in *Cabana v. Bullock*, provides further support for our conclusion. *Cabana* held that an appellate court could constitutionally make the *Enmund v. Florida* finding — that the defendant killed, attempted to kill, or intended to kill — in the first instance. We noted that "*Enmund*, 'does not affect the state's definition of any substantive offense, even a capital offense,' " and that "while the Eighth Amendment prohibits the execution of such defendants, it does not supply a new element of the crime of capital murder that must be found by the jury." *Enmund* only places "a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury." If the Constitution does not require that the *Enmund* finding be proved as an element of the offense of capital murder, and does not require a jury to make that finding, we cannot conclude that a State is required to denominate aggravating circumstances "elements" of the offense or permit only a jury to determine the existence of such circumstances.
>
> We thus conclude that the Arizona capital sentencing scheme does not violate the Sixth Amendment.

497 U.S. at 648-49, 110 S.Ct. at 3054-55 (citations omitted).

Appendix A

II.

¶70 In *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), the Court made it clear that *Enmund/Tison* findings may be made by the trial court and even an appellate court, rather than a jury. And yet, without explanation, the majority says that it is relevant that "[w]ithout Greenham's testimony at the sentencing hearing, we conclude that the evidence admitted at trial failed to prove, beyond a reasonable doubt, that Defendant was a major participant in the armed robbery or that he actually murdered Magoch." *Ante*, ¶ 48. I do not understand the relevance of any of the observations made in paragraph 48 of the majority's opinion. It would have been enough to say that the trial court's *Enmund/Tison* finding was supported by the evidence. The presence of paragraph 48 in the majority opinion, together with its discussion of *Apprendi*, suggests that the majority not only believes that *Apprendi* may affect *Walton*, but that *Apprendi* may affect *Cabana*. Yet *Apprendi* makes no mention of *Cabana*, and Ring does not raise the issue here. I would not reach out to comment on issues not presented.

FREDERICK J. MARTONE, Justice

APPENDIX B — SPECIAL VERDICT (COUNT I) OF THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA DATED AND FILED OCTOBER 29, 1997

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. CR 95-01754

STATE OF ARIZONA,

Plaintiff,

vs.

TIMOTHY STUART RING

Defendant.

SPECIAL VERDICT
(Count I)

Based upon the evidence adduced at the trial and the sentencing hearing and a review of the presentence report and the Court's file this Court now renders this Special Verdict as to Count I, Murder in the First Degree.

The Defendant was found guilty of Count I, Murder in the First Degree, by a jury on December 6, 1996. The victim was John Magoch.

This Court conducted an aggravation/mitigation sentencing hearing pursuant to ARS Section 13-703(B) on October 9 and 20, 1997. Both the State and the Defendant were given the opportunity to present evidence and argument concerning the existence or nonexistence of the aggravating and mitigating circumstances included in ARS Sections 13-703(F) and (G); and both parties were given the opportunity to present any other relevant mitigating circumstances not specifically included in subsection (G) for the Court's consideration.

All the material in the presentence report has been disclosed to the Defendant's attorney and to the prosecution.

ENMUND-TISON FINDINGS

The State charged the Defendant in Count I with Murder in the First Degree alleging that the Defendant knowing that his conduct would cause death, with premeditation, caused the death of Mr. Magoch. The State also alleged, alternatively, that the Defendant acting either alone or with one or more other persons committed or attempted to commit the crime of armed robbery and in the course of and in furtherance of this crime or immediate flight from this crime the Defendant or another person caused the death of Mr. Magoch. All twelve members of the jury voted the Defendant guilty of felony murder. Six members also voted the Defendant guilty of premeditated murder.

For the Court to impose a death sentence in this case the Court must first find beyond a reasonable doubt that the Defendant was the killer, or that the Defendant intended to

kill or attempted to kill, or that the Defendant was a major participant in the armed robbery that led to the killing and exhibited a reckless disregard or indifference for human life.

The Court finds beyond a reasonable doubt based upon the evidence adduced at trial and at the aggravation/mitigation sentencing hearing that the Defendant is the one who killed Mr. Magoch. The evidence also clearly establishes beyond a reasonable doubt that the Defendant was a major participant in the armed robbery of Mr. Magoch that resulted in him being killed and that the Defendant's conduct exhibited a reckless disregard for human life.

The facts as established by the evidence are that the Defendant was the mastermind of this criminal scheme — the person who planned and directed the robbery and shot Mr. Magoch. Many thousands of dollars in cash was taken from the armored car which Mr. Magoch drove. Approximately $270,000 in cash was found in the Defendant's garage. Written paper evidence in the Defendant's handwriting was found which included the "splits" note and index cards with addresses, times, and other armored car numbers written on them. The wiretap conversations also disclose that the Defendant was involved in the robbery. Mr. Greenham, a co-defendant, has testified at the aggravation/mitigation sentencing hearing that the Defendant is the one who shot and killed Mr. Magoch. Finally, the Court agrees with the State that the crime of armed robbery, and especially this armed robbery, is unquestionably a crime which carries with it a grave risk of death.

Accordingly, this Court concludes that the death penalty remains at this point in the analysis a legal sentence for the Court to impose on Count I.

AGGRAVATION-STATUTORY

(1) The Court finds that the State has not proved the existence of statutory aggravating circumstance (F)(1), that is, that the Defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

(2) The Court finds that the State has not proved the existence of statutory aggravating circumstance (F)(2), that is, that the Defendant was previously convicted of a serious offense, whether preparatory or completed.

(3) The Court finds that the state has not proved the existence of statutory aggravating circumstance (F)(3), that is, that in the commission of the offense the Defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

(4) The Court finds that the State has not proved the existence of statutory aggravating circumstance (F)(4), that is, that the Defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(5) As to statutory aggravating circumstance (F)(5), the Court finds beyond a reasonable doubt that the Defendant committed the offense in expectation of the receipt of anything of pecuniary value.

The evidence clearly shows beyond a reasonable doubt that Mr. Magoch was killed in order to obtain the approximately one-half million dollars in cash in the armored car. Taking the cash from the armored car was the motive and reason for Mr. Magoch's murder and not just the result.

(6) As to statutory aggravating circumstance (F)(6), the Court finds beyond a reasonable doubt that the Defendant committed the offense in an especially heinous, cruel or depraved manner.

For purposes of the application of this aggravating circumstance Arizona law provides that "cruelty" is the pain and suffering of the victim experienced prior to death, including mental distress. The terms "heinous" and "depraved" focus upon a defendant's state of mind at the time of the offense. The statute is phrased in the disjunctive and if any one of the three factors is found the circumstance is satisfied.

When determining whether a crime is especially heinous or depraved within the meaning of this statutory aggravating circumstance considerations include whether the perpetrator relished the murder. At the aggravation/mitigation sentencing hearing Mr. Greenham testified that the Defendant, while they were counting the loot taken from the robbery of Mr. Magoch, said to his confederates "you guys are forgetting something — you're forgetting to congratulate me on my shot". All the evidence shows beyond a reasonable doubt that this Defendant did not appreciate the seriousness of his conduct in shooting Mr. Magoch and by his statement in the presence of Mr. Greenham, in fact, took great liking or

enjoyment in his actions. The Court is mindful in determining the facts as to this statutory aggravating circumstance as well as in making its *Enmund-Tison* findings that Mr. Greenham's credibility as a witness is an issue and that Mr. Greenham's testimony regarding the statement is uncorroborated. The Court has had occasion to observe Mr. Greenham while testifying and accordingly to assess his believability concerning whether the Defendant in fact made the statement attributed to him above. The Court has considered Mr. Greenham's demeanor while testifying along with all the other evidence in the case and resolves that Mr. Greenham is credible regarding the Defendant being the shooter and the Defendant's statement. The statement — "you guys are forgetting something — you're forgetting to congratulate me on my shot" — shows an abhorrent lack of regard for human life and that the Defendant seemed to savor or enjoy the murder of Mr. Magoch.

(7) The Court finds that the State has not proved the existence of aggravating circumstance (F)(7), that is, that the Defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

(8) The Court finds that the State has not proved the existence of aggravating circumstance (F)(8), that is, that the Defendant has been convicted of one or more other homicides as defined in ARS Sec. 13-1101, which were committed during the commission of the offense.

(9) The Court finds that the State has not proved the existence of aggravating circumstance (F)(9), that is, that the Defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age or was seventy years of age or older.

(10) The Court finds that the State has not proved the existence of statutory aggravating circumstance (F)(10), that is, that the murdered individual was an on duty peace officer who was killed in the course of performing his official duties and the Defendant knew, or should have known, that the victim was a peace officer.

MITIGATION-STATUTORY

(1) The Court finds that statutory mitigating circumstance (G)(1), that is, that the Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution has not been proved by a preponderance of the evidence and does not exist.

(2) The Court finds that statutory mitigating circumstance (G)(2), that is, that the Defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution has not been proved by a preponderance of the evidence and does not exist.

(3) The Court finds that statutory mitigating circumstance (G)(3), that is, that the Defendant was legally accountable for the conduct of another under the provisions

of ARS Section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution has not been proved by a preponderance of the evidence and does not exist.

(4) The Court finds that statutory mitigating circumstance (G)(4), that is, that the Defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the Defendant was convicted would cause, or would create a grave risk of causing, death to another person has not been proved by a preponderance of the evidence and does not exist.

(5) The Court finds that statutory mitigating circumstance (G)(5), that is, whether the Defendant's age at the time of the offense is a mitigating circumstance has not been proved by a preponderance of the evidence and does not exist.

MITIGATION-NONSTATUTORY

The Court finds that the Defendant's minimal criminal record is a nonstatutory mitigating circumstance.

Beyond that, the Defendant has not proven the existence of any other nonstatutory mitigating circumstances by a preponderance of the evidence and accordingly none exist. This Court rejects that the Defendant has proved by a preponderance of the evidence that Mr. Greenham, and not the Defendant, was the shooter or that the Defendant was not at the scene of the robbery/murder regardless of who else may have been present and shot Mr. Magoch.

The Court has now weighed the aggravating and mitigating circumstances found to exist. This Court has considered statutory aggravating circumstances (F)(5) and (F)(6) which were proved beyond a reasonable doubt and found to exist and concludes that there are no mitigating circumstances sufficiently substantial to call for leniency. The Court specifically notes that had the State proved beyond a reasonable doubt only statutory aggravating circumstance (F)(5) that there remains still no mitigating circumstances sufficiently substantial to call for leniency. This was a cold-blooded, very calculated and premeditated murder to facilitate the robbery of thousands and thousands of dollars. The evidence is overwhelming that the Defendant was a principal, chief participant in the whole scheme.

Accordingly, as to Count I, Murder in the First Degree, it is the judgment and sentence of the court that the defendant, Timothy Stuart Ring, be sentenced to death in the manner set forth in ARS Sec. 13-704.

Dated this 29th day of October, 1997.

s/ Gregory H. Martin
The Hon. Gregory H. Martin

APPENDIX C — RELEVANT STATUTES

A.R.S. § 13-703

§ 13-703. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definitions

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life as determined and in accordance with the procedures provided in subsections B through G of this section. If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life. An order sentencing the defendant to natural life is not subject to commutation or parole, work furlough or work release. If the court does not sentence the defendant to natural life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed.

The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. A victim may submit a written victim impact statement, an audio or video tape statement or make an oral impact statement to the probation officer preparing the presentence report for the probation officer's use in preparing the presentence report. The probation officer shall consider and include in the presentence report the victim impact information regarding the murdered person and the economical, physical and psychological impact of the murder on the victim and other family members. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding.

Appendix C

The victim has the right to be present and to testify at the hearing. The victim may present information about the murdered person and the impact of the murder on the victim and other family members. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section. In evaluating the mitigating circumstances, the court shall consider any information presented by the victim regarding the murdered person and the impact of the murder on the victim and other family members. The court shall not consider any recommendation made by the victim regarding the sentence to be imposed.

E. In determining whether to impose a sentence of death or life imprisonment, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

Appendix C

F. the court shall consider the following aggravating circumstances:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a serious offense, whether preparatory or completed.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.

10. The murdered person was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

G. The court shall consider as mitigating circumstances any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his

participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

H. As used in this section:

1. "Serious offense" means any of the following offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the following offenses:

(a) First degree murder.

(b) Second degree murder.

(c) Manslaughter.

(d) Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.

(e) Sexual assault.

(f) Any dangerous crime against children.

(g) Arson of an occupied structure.

(h) Robbery.

(i) Burglary in the first degree.

(j) Kidnapping.

(k) Sexual conduct with a minor under fifteen years of age.

2. "Victim" means the murdered person's spouse, parent, child or other lawful representative, except if the spouse, parent, child or other lawful representative is in custody for an offense or is the accused.

* * *

A.R.S. § 13-1105

§ 13-1105. First degree murder; classification

A. A person commits first degree murder if:

1. Intending or knowing that the person's conduct will cause death, the person causes the death of another with premeditation.

2. Acting either alone or with one or more other persons the person commits or attempts to commit sexual conduct with a minor under § 13-1405, sexual assault under § 13-1406, molestation of a child under § 13-1410, marijuana

offenses under § 13-3405, subsection A, paragraph 4, dangerous drug offenses under § 13- 3407, subsection A, paragraphs 4 and 7, narcotics offenses under § 13-3408, subsection A, paragraph 7 that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses under § 13-3409, kidnapping under § 13-1304, burglary under § 13-1506, 13-1507 or 13-1508, arson under § 13-1703 or 13-1704, robbery under § 13-1902, 13-1903 or 13-1904, escape under § 13-2503 or 13-2504, child abuse under § 13- 3623, subsection A, paragraph 1, or unlawful flight from a pursuing law enforcement vehicle under § 28-622.01 and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.

3. Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.

B. Homicide, as prescribed in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.

C. First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703.

* * * *